UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRIAD RESTAURANT GROUP, LLC

and **Case No. 22-CA-165746**

OUTTEN & GOLDEN, L.L.P.

RESPONDENT BRIAD RESTAURANT GROUP, LLC'S ANSWERING BRIEF TO THE NATIONAL LABOR RELATIONS BOARD

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I. INTRODUCTION

Respondent Briad Restaurant Group, L.L.C. ("Respondent" or "Briad") hereby submits its Answering Brief to the National Labor Relations Board ("NLRB" or the "Board") for a decision based on the stipulated record. As detailed in Briad's Opening Brief, the class action waiver set forth in the arbitration agreement Briad generally asks its new employees to sign (hereinafter, the "Class Action Waiver" and the "Arbitration Agreement") is permitted by and must be enforced pursuant to the Federal Arbitration Act (the "FAA"). Under these circumstances, and for the reasons set forth herein and in its Opening Brief, Respondent respectfully asks the Board to dismiss the Counsel for the General Counsel's (the "CGC") Complaint.

II. THE ARBITRATION AGREEMENT IS ENFORCEABLE UNDER BINDING SUPREME COURT PRECEDENT

Binding U.S. Supreme Court precedent and the FAA require that the Arbitration Agreement be upheld for the various reasons detailed in Briad's Opening Brief (which, for the sake of economy, are not repeated herein).

All of the CGC's various arguments to the contrary set forth in its Opening Brief rely on one central but faulty premise: that the right to bring a class or collective action is a substantive (as opposed to procedural) right under the National Labor Relations Act (the "Act"), and that therefore any agreements which restrict this right necessarily violate the Act. In support of this erroneous proposition, the CGC predictably relies on the Board's decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012) and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014) — each of which decisions the Fifth Circuit refused to enforce — and cherry-picks the Seventh Circuit's decision in *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1159-60 (7th Cir. 2016) and the Ninth Circuit's decision in *Morris v. Ernst & Young LLP*, 834 F.3d 975, 998 (9th Cir. 2016).

What the CGC conveniently ignores in its Opening Brief, however, is the plethora of federal circuit and district court decisions rejecting *D.R. Horton* and its progeny which Briad cited in its Opening Brief.

For example, the Second Circuit has explicitly declined to follow the Board's conclusion in *D.R. Horton* that class-action waivers violate the NLRA. *See Sutherland v. Ernst & Young LLP,* 726 F.3d 290, 297-98, n.8 (2d Cir. 2013) ("[W]e decline to follow the decision in *D.R. Horton*. Even assuming that *D.R. Horton* addressed the more limited type of class waiver present here, we still would owe no deference to its reasoning.") (internal quotations and citation omitted); *Patterson v. Raymours Furniture Co.*, No. 15-2820-cv, 2016 U.S. App. LEXIS 16240, at *7-8 (2d Cir. Sept. 2, 2016) (enforcing class waiver and citing to its prior decision in *Sutherland* where it "unquestionably" rejected the NLRB's analysis "and embraced the Eight Circuit's position in *Owen*"). Likewise, the Fifth Circuit (on no fewer than six occasions and as recently as last week) and the Eighth Circuit (on no fewer than two occasions) have explicitly rejected the Board's position concerning class action waivers. *See Jack in the Box v. NLRB*, No. 16-60386, 2016 U.S. App. LEXIS 22102, at *1 (5th Cir. Dec, 13, 2016) (**"The Board's Decision** [nullifying class action waivers on the grounds that they are violative of the Act] **ignores the Supreme Court's binding analytical framework…."**) (emphasis added); *Citigroup Tech., Inc. v. NLRB,* No. 15-60856, 2016 U.S. App. LEXIS 21945 (5th Cir. Dec. 8, 2016); *Emplrs. Res. v. NLRB,* No. 16-60034, 2016 U.S. App. LEXIS 19619 (5th Cir. Nov. 1, 2016) (citing to its prior decisions in *D.R. Horton* and *Murphy Oil* in denying enforcement of the Board's application to enforce its order directing employer-respondent to rescind its arbitration agreement containing a class waiver)*; Chesapeake Energy Corp. v. NLRB*, 633 F. App'x 613 (5th Cir. 2016)*; Murphy Oil USA, Inc. v. NLRB,* 808 F.3d 1013 (5th Cir. 2015)*; D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d

344 (5th Cir. 2013); *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

Moreover, on August 9, 2016, the United States District Court for the District of Massachusetts upheld the validity of an employer's class action waiver, rejecting arguments that the waiver ran afoul of the Act. *See Bekele v. Lyft, Inc.*, No. 15-11650-FDS, 2016 U.S. Dist. LEXIS 104921 (D. Mass. Aug. 9, 2016). Significantly, in its decision, the *Lfyt* Court thoroughly analyzed and then pointedly criticized the Seventh Circuit's decision in *Lewis* for its "critical misstep" in logic in concluding that "an employee's ability to bring a collective action against his employer is 'other concerted activit[y]' protected by Section 7." *Id.* at *55 (citing *Lewis*, 823 F.3d at 1152).

More specifically, the *Lyft* Court demonstrated how the *Lewis* Court erroneously supplied its own definition of "concerted activities," relying in large part on a dictionary definition, whereas the *proper* "starting point, and normally the ending point, for construing a statute is the words of the statute itself." *Id.* at *55-56. As noted by the Supreme Court, "[w]hether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words. Rather 'the plainness or ambiguity of statutory language is determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole.'" *Id.* at *56 (citing *Yates v. United States*, 135 S. Ct. 1074, 1081-82 (2015)).

With respect to Section 7 of the Act, the actual text states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage *in other concerted activities* for the purpose of collective bargaining or other mutual aid or protection." *Id.* at *57 (citing 29 U.S.C. §

157). The *Lyft* Court explained that the context in which the words "in other concerted activities" appear serve to clarify their meaning. "[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words," under the long-established canon of statutory construction known as *ejusdem generis*. *Id.* at *57-58 (internal quotations and citations omitted).

Therefore, with respect to Section 7 of the Act, "the specific terms that give 'other concerted activities' meaning are the 'right to self-organization,' the right to 'form, join, or assist labor organizations,' and the right 'to bargain collectively through representatives of their own choosing.'" *Id.* at *59 (citing 29 U.S.C. § 157). Under these circumstances, the term "other concerted activities" must be interpreted to mean other concerted activities "of a similar type as the three enumerated activities." *Id.* (emphasis added). "That would include, for example, such collective employee actions as picketing or organizing boycotts," the court held, but "[i]t would not, however, include an employee's ability to bring a class-action lawsuit under Fed. R. Civ. P. 23, which is of a different class or character than the enumerated rights. Rule 23 provides a procedural vehicle for all persons to use to assert certain types of claims, not a substantive right of employees to act collectively in the labor marketplace." *Id.* at *59-60.

In sum, the *Lyft* Court concluded, the *Lewis* Court and the Board have erred by invalidating class action waivers as "it is clear from the text of the NLRA that an employee's ability to bring a class action against his employer under Rule 23 is not a substantive right protected by the statute. Rather—just as it is for every other type of plaintiff—it is a procedural vehicle by which an employee may seek to enforce a substantive right." *Id.* at *61. *See also Deposit Guar. Nat'l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a

litigant to employ [a class action under Rule 23] is a procedural right only, ancillary to the litigation of substantive claims.").[1]

Similarly, a United States District Court for the District of New Jersey — in which state Briad is headquartered — most recently rejected the Board's position that class waivers violate employees' Section 7 rights and held that such waivers are enforceable because they are "merely a procedural device that can be contractually waived by the parties without infringing upon [an employee's] statutory rights." *Kobren v. A-1 Limousine Inc.*, No. 15-516-BRM-DEA, 2016 U.S. Dist. LEXIS 154012, at *12 (D.N.J. Nov. 7, 2016).

As class action waivers do not implicate any *substantive* rights protected by the Act, all of the CGC's various arguments as to why the Board should find the Arbitration Agreement to be violative of the Act necessarily fall by the wayside. Briad therefore respectfully requests that the Board reconsider its holding in *D.R. Horton* and its progeny and find the Arbitration Agreement to be enforceable.

III. CONCLUSION

For all the foregoing reasons and for all the reasons set forth in Briad's Opening Brief, Briad respectfully requests that the Board find that Briad did not violate Section 8(a)(1) of the Act, and dismiss the Complaint in its entirety with prejudice.

[1] As previously noted, on August 22, 2016, the Ninth Circuit aligned itself with the Seventh Circuit in finding the right to bring a class or collective action to not merely be procedural in nature. *See Morris,* 834 F.3d 975. The Ninth Circuit, in so holding, committed the same "critical misstep" in logic as the *Lyft* Court criticized the Seventh Circuit for committing in *Lewis*. Moreover, the Ninth Circuit itself recognized that its decision in *Morris* was at odds with the majority of circuit courts to have ruled on this issue. *See id.* at 990 n.16, 998 ("The Second, Fifth, and Eighth Circuits have concluded that the NLRA does not invalidate collective action waivers in arbitration agreements.") (dissent).

Dated: New York, NY

December 22, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2016, a true and correct copy of the forgoing was filed with the Board via the Board's electronic filing system, and served by electronic mail upon the following:

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